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SUPREME COURT, U. S.

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Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 522.

JULIUS RANNY RAGAN, PETITIONER,

VS.

MERCHANTS TRANSFER & WAREHOUSE COMPANY, INC., A CORPORATION, RESPONDENT.

BRIEF OF MERCHANTS TRANSFER & WAREHOUSE COMPANY, INC., A CORPORATION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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of Fort Scott, Kansas,
Counsel for Respondent.

HOWARD HUDSON,
DOUGLAS G. HUDSON,
Both of Fort Scott, Kansas,
Of Counsel.

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To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the United States:

PRELIMINARY STATEMENT.

Your respondent, Merchants Transfer & Warehouse Company, Inc., a corporation, respectfully submits its suggestions in opposition to the petition for writ of certiorari filed herein by the petitioner, Julius Ranny Ragan.

This respondent admits the correctness of the summary statement of the matter involved set forth on pages 2 and 3 of the printed petition.

This respondent denies the accuracy of "The Questions Presented" as phrased by the petitioner on pages 4 and 5 of his petition.

The petitioner's breakdown of "The Questions Presented" is confusing. We would answer these questions *seriatim* as follows, viz.:

Question I. "Was Petitioner's action commenced within two years from the date of Petitioner's injury, so as to avoid the bar of the Kansas Statute of Limitations?"

A. No. It was not commenced within the meaning of the Kansas statute of limitations, which provides for service of summons as an integral part of the statute of limitations.

Question II. "Did the Court of Appeals for the Tenth Circuit decide an iimportant and substantial question of Federal law which has not been, but should be, settled by the United States Supreme Court?"

A. No. The United States Supreme Court has answered the question, and in innumerable decisions Circuit Courts of Appeals and United States District Courts with unanimity have followed the settled law as declared by the United States Supreme Court.

Question III. "Was it proper for the Court of Appeals to apply the law of Kansas to determine the date of commencing this action in the Federal District Court?"

A. Yes. It was obligatory upon the Circuit Court of Appeals to apply the law of Kansas as enacted by its legislature and declared by its Supreme Court relative to the statute of limitations.

"A. Is this not contrary to the law of Kansas?" A. Emphatically no. The suggestion that the rule accepted by the Circuit Court of Appeals is contrary to the law of

Kansas is presented for the first time in the petition filed in this court. In the United States District Court, the petitioner's attorneys stated

"I concede—freely concede, that if this case was pending in the State Court, if it had been commenced in the State Court and pending in the State Court then the cause of action would have been barred * * *." (R. 48).

"B. Is not such decision in direct conflict with its own prior decisions and the decisions of other Federal Courts?" A. No. The petitioner as the appellee labored in the Circuit Court of Appeals to exalt *Isaacks* v. *Jeffers*, 144 F. 2d 26, as a decision of the Tenth Circuit Court of Appeals in his favor upon the vital question involved in the appeal. We can do no better certainly than to exhibit Judge Huxman's own analysis of this contention (R. 50). Judge Huxman wrote the opinions in the Circuit Court of Appeals in the instant case as well as the case of *Isaacks* v. *Jeffers*. Our later citations will demonstrate that the decision is not in conflict with the decisions of other Federal Courts.

"C. Does not such decision violate the statute law of the United States, in view of the fact that the Federal Rules of Civil Procedure have the force and effect of statute?" A. No. The Federal Rules of Civil Procedure do not pretend to establish any period of limitations.

Question IV. "Does this decision constitute an unwarranted and highly improper extension of the case of *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079?"

A. No. The decision of the Circuit Court of Appeals follows the rule of *Guaranty Trust Company* v. *York* as it has been understood and applied in more than seventy-five cases as will be attested by reference to United States Citations.

ARGUMENT.

The Kansas law on the subject is plain. The petitioner in this court for the first time seeks to raise some queries as to the Kansas decisions upon a like factual situation.

Article 3 of the Code of Civil Procedure of the State of Kansas (p. 1208; G. S. Kan., 1935) carries the title, "Commencement and Limitation of Actions." Of that article, Sections 60-301, 60-306 and 60-308 are correctly quoted on page 27 of the petition. The intervening sections we consider unimportant in the consideration of the matter before the court.

At this juncture, we may suggest that Section 60-301, G. S. Kan., 1935, is analogous to Rule 3 of the Federal Rules of Civil Procedure, as indicated in the opinion of Judge Huxman (R. 46-47).

The decisions of the Supreme Court of Kansas cited by Judge Huxman in the footnote appearing at page 49 of the printed record amply sustain the proposition that if the case had been pending in the Kansas courts, the bar of the statute of limitations would have fallen.

Be that as it may, it was never until the case reached this court that any different theory was suggested by opposing counsel. In the United States District Court, counsel for the petitioner, Julius Ranny Ragan, freely concede that if the case had been pending in the State Court "the cause of action would have been barred" (R. 48).

The sole and only theory upon which the petitioner, Julius Ranny Ragan, relied in the District Court and in the Circuit Court of Appeals was that Section 60-308, Gen-

eral Statutes for Kansas, 1935, did not apply, because the Federal Rules of Civil Procedure in effect repealed or neutralized that section of the Kansas statute of limitations.

The decisions are so innumerable upon the question of invited error and the foreclosure of a party from changing his entire theory in an appellate court from that in which he has concurred in the lower court, that we will cite very few cases. These cases will be found under Key No. 882 of Appeal and Error of the Federal Digest. A few perhaps from the Tenth Circuit of Appeals might be cited.

City and County of Denver v. *Denver Tramway Corp.*, 23 F. 2d 287.

American Surety Co. of N. Y. v. *James A. Dick Co.*, 23 F. 2d 464.

Wickwire v. *Martin*, 63 F. 2d 64.

Saulsbury Oil Co. v. *Phillips Pet. Co.*, 142 F. 2d 27.

The real point involved is whether or not *Guaranty Trust Company of New York* v. *York* means what it says.

In the brief of the petitioner filed in the Circuit Court of Appeals, we find this language:

> "Defendant apparently places great reliance upon the opinion of the court in the case of *Guaranty Trust Company of New York* v. *York*, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079. We submit that that case is not in point and does not aid defendant's position. That case involves simply and only the question of whether a Federal Court was compelled to apply a State Statute of Limitation. That case did not involve the question as to when an action is commenced. It is true that the Supreme Court used extremely loose language regarding putting aside 'abstractions' regarding 'substance' and 'procedure,' but such language was not only loose, it was pure *obiter dictum* so

> far as the question here is concerned. A careful reading of the opinion in the Guaranty Trust Company case will clearly reveal that that case did not touch upon the question as to when an action is deemed commenced, and the sole question submitted and determined was that the rule announced in *Erie R. R. Co. v. Tompkins*, a law case, applied also in equity cases in the Federal courts. Beyond that the decision does not go."

If the language of the case was *obiter dictum*, or even as petitioner thought "pure *obiter dictum*," the courts, both Federal and State have accepted the rule of the case as conclusive that when jurisdiction rests upon diversity of citizenship the result shall be the same in the Federal Court as it would have been in the State Court.

As a matter of local color, it might be of interest to know that the Federal Building, housing the Post Office and the Third Division of the United States District Court for the District of Kansas, at Fort Scott, Kansas, is directly across the street from the Bourbon County District Court.

In the case of *Guaranty Trust Company of New York v. York, supra*, the following language appears:

> "The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to substantially different result."

Here, the courts are in such close proximity that each might hear on a summer's day from his own bench the conflicting views of the other if the argument of the petitioner shall prevail.

Following the decision of this court in the York case, we find the following language in *Angel* v. *Bullington*, 330 U. S. 183, 91 L. Ed. 832, Headnotes 10, 11 and 12:

"It is suggested that the North Carolina Supreme Court construed the North Carolina statute to close only the North Carolina State courts but not the federal court sitting in North Carolina. In the first place, the North Carolina Supreme Court said no such thing. It construed the statute expressive of State policy and spoke only of the jurisdiction of the State courts because it was concerned only with the State courts. Secondly, it is most incongruous to attribute to the legislature and judiciary of North Carolina the imposition of a restriction against all its citizens from suing for a deficiency judgment, while impliedly authorizing citizens of other States to secure such deficiency judgments against North Carolinians. Thirdly, a North Carolina statute, upheld by the highest court of North Carolina, is of course expressive of North Carolina policy. The essence of diversity jurisdiction is that a federal court enforces State law and State policy. If North Carolina has authoritatively announced that deficiency judgments cannot be secured within its borders, it contradicts the presuppositions of diversity jurisdiction for a federal court in that State to give such a deficiency judgment. North Carolina would hardly allow defeat of a State-wide policy through occasional suits in a federal court. What is more important, diversity jurisdiction must follow State law and policy. A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld. Availability of diversity jurisdiction which was put into the Constitution so as to prevent discrimination against outsiders is not to effect discrimination against the great body of local citizens.

"Cases like *David Lupton's Sons Co.* v. *Automobile Club*, 225 U. S. 489, 56 L. Ed. 1177, 32 S. Ct. 711, Ann. Cas. 1914A, 699, are obsolete insofar as they are based on a view of diversity jurisdiction which came to an

end with *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487. That decision drastically limited the power of federal district courts to entertain suits in diversity cases that could not be brought in the respective State courts or were barred by defenses controlling in the State courts. Compare *Suydam* v. *Broadnax*, 14 Pet. (U. S.) 67, 75, 10 L. Ed. 357, 361. Of course, where resort is had to a federal court not on grounds of diversity of citizenship but because a federal right is claimed, the limitations upon the courts of a State do not control a federal court sitting in the State, *Holmberg* v. *Armbrecht*, 327 U. S. 392, 90 L. Ed. 743, 66 S. Ct. 582, 162 A. L. R. 719."

In *Holmberg* v. *Armbrecht*, 327 U. S. 392, 90 L. Ed. 743, 162 A. L. R. 719, 66 S. Ct. 582, this court said:

"In *Guaranty Trust Co.* v. *York*, *supra*, we ruled that when a State statute bars recovery of a suit in a State court on a State-created right, it likewise bars recovery of such a suit on the equity side of a federal court brought there merely because it was 'between Citizens of different states' under Article III, Section 2 of the Constitution. The amenability of such a federal suit to a State statute of limitation cannot be regarded as a problem in terminology, whereby the practical effect of a statute of limitation would turn on the content which abstract analysis may attribute to 'substance' and 'procedure.' We held, on the contrary, that a statute of limitation is a significant part of the legal rules which determine the outcome of a litigation. As such, it is as significant in enforcing a State-created right by an exclusively equitable remedy as it is in an action at law. But in the York Case we pointed out with almost wearisome reiteration, in reaching this result, that we were there concerned solely with State-created rights. For purposes of diversity suits a Federal court is, in effect, 'only another court of the State.' *Guaranty Trust Co.* v. *York*, *supra* (326 U. S.,

at 108, 89 L. Ed. 2086, 65 S. Ct. 1464, 160 A. L. R. 1231)."

It should be observed here that the commencement of an action, as provided by Sec. 60-301, G. S. Kan., 1935, and Rule 3 of the Federal Rules of Civil Procedure, has significance in other respects than as a statute of limitations. An attachment or other provisional remedy may not be invoked until an action has been commenced. In a suit involving title to real property *lis pendens* does not attach until an action has been commenced. These are the incidents of the commencement of an action which are determined by Sec. 60-301, G. S. Kan., 1935, and Rule 3 of the Federal Rules of Civil Procedure.

This view of the Kansas statute is described in *Bannister* v. *Carroll*, 43 Kan. 64, 22 Pac. 1012, cited in the footnote of Judge Huxman's opinion at page 49 of the record.

A State statute of limitations is frequently applied in connections other than the commencement of an action in court. In Kansas a claim for workmen's compensation is barred unless a written claim is delivered to the employer within 120 days after the accident. Sec. 44-520a, 1947 Supp.

> "No action shall be maintained by any person or corporation against any city on account of injury to person or property unless the person or corporation injured shall within three months thereafter and prior to the bringing of the suit file with the city clerk a written statement, giving the time and place of the happening of the accident or injury received and the circumstances relating thereto. * * *." Sec. 12-105, G. S. Kan., 1935.

These statutes of the State of Kansas are similar to the statutes of the State of Wisconsin, as quoted on pages 37 and 38 of the petition herein.

The petitioner relies upon *Krisor* v. *Watts*, 61 F. Supp. 845 (D. C. E. D. Wisc., 1945). It is our suggestion that the case of *Krisor* v. *Watts* was correctly decided if the petitioner's position is correct. By the same analogy in the United States District Courts of Kansas actions would lie by non-citizens for workmen's compensation and as against cities for torts, although the claimants had not complied with the provisions of the Kansas statutes relative to the filing of claims as constituting a part of the statutes of limitations applicable.

In "Recent Developments in Federal Practice and Procedure" by Werner Ilsen, published by West Publishing Company, 1947 Revised Edition of "Federal Rules of Civil Procedure with Approved Amendments," the case of *Krisor* v. *Watts*, *supra*, was criticised in the following language:

> "Since in this case the requirement of notice for service within the period of limitations was an integral part of the Wisconsin statute of limitations it would seem that this holding is incorrect. In diversity of citizenship cases the federal courts under *Erie R. Co.* v. *Tompkins* and *Guaranty Trust Co. of N. Y.* v. *York* must follow the state statute and in so doing they should not be permitted to refuse to adopt a portion of it. The state statute should be applied *in toto*." p. 321.

The footnote supporting the criticism reads as follows:

> "Cf, Charles E. Clark, A.B.A. Proceedings of the Cleveland Institute on Federal Rules (1938) 203: 'If there were a state statute of limitations which covered the question so thoroughly, which said, for example, that an action shall be barred unless summons is served within six years, I don't think that this rule (Rule 3) would have any effect at all, because it doesn't cover the same ground.'"

The opinion in *Quinette* v. *Pullman Co.*, (C. C. A. 8) 229 Fed. 333, mentions and quotes from the previous de-

sions of the Supreme Court of the United States upon e question in the following language:

"It is elementary that the federal courts ordinarily are bound by the decisions of the Supreme Court of a state as to the interpretation and construction of a state statute. The cases in general upon this question are too numerous to cite, but reference is made to all the authorities cited in the Encyclopedia of the U. S. Reports, Vol. 4, p. 1066 *et seq.*, and Vol. 12, p. 424, but reference will be had to some of the cases arising under the statute of limitations:

" 'Sec. 721. The laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.' Revised Statutes of the United States.

"In *Bauserman* v. *Blunt*, 147 U. S. 647, 652, 13 S. Ct. 466, 468 (37 L. Ed. 316), it is said:

" 'No laws of the several states have been more steadfastly or more often recognized by this court, from the beginning, as rules of decision in the courts of the United States, than statutes of limitations of actions, real and personal, as enacted by the Legislature of a state, and as construed by its highest court' (Citing many decisions of the Supreme Court of the United States).

"In *Metcalf* v. *Watertown*, 153 U. S. 671, 673, 14 S. Ct. 947, 948 (38 L. Ed. 861), it is said:

" 'And from the beginning this court has recognized statutes of limitations of actions, real and personal, as enacted by the Legislature of a state, and as construed by its highest court, as rules of decision in the courts of the United States.'

"In *Patton* v. *Easton*, 1 Wheat. 476, 482, 4 L. Ed. 139, and again in *Powell* v. *Harman*, 2 Pet. 241, 7 L.

Ed. 411, the Supreme Court construed a Tennessee statute of limitations of real actions in accordance with the decisions of the Supreme Court of that state; yet in *Green* v. *Neal*, 6 Pet. 291, 8 L. Ed. 402, a judgment of the Circuit Court of the United States which had followed those cases was reversed because of a more recent decision of the state Supreme Court establishing the opposite construction, and in *Leffingwell* v. *Warren*, 2 Black. 599, 603, 17 L. Ed. 261, the Supreme Court said:

> "'The courts of the United States, in the absence of legislation upon the subject by Congress, recognize the statutes of limitations of the several states, and give them the same construction and effect which are given by the local tribunals. They are a rule of decision under the thirty-fourth section of the Judiciary Act of 1789. The construction given to a statute of a state by the highest judicial tribunal of such state is regarded as a part of the statute, and is as binding upon the courts of the United States as the text. * * * If the highest judicial tribunal of a state adopt new views as to the proper construction of such a statute, and reverse its former decisions, this court will follow the latest settled adjudications.'"

The above mentioned opinion is followed with quotations from other opinions of the Supreme Court of the United States, and makes this further comment:

> "No case has been found where the Supreme Court has under any circumstances authorized a departure from this rule as applied to questions arising under the statute of limitations". (p. 337).

Since the decision in *Guaranty Trust Company of New York* v. *York*, it has been cited and followed perhaps as frequently as any opinion of this court during the period which has passed.

In *Lachman* v. *Pennsylvania Greyhound Lines*, (C. C. A. 4) 160 F. 2d 496, 499, we find the following:

"The line between substance and procedure is not so clearly marked as to be free from doubt in all cases, and the decisions have been influenced by the desire to effectuate the spirit of the doctrine of *Erie R. Co.* v. *Tompkins* so as to secure uniformity in the results to be obtained in the state courts and in the federal courts in diversity cases in each state. This is especially desirable when the remedial law of the state is so closely associated and incorporated with its substantive law as to be necessary in order to maintain and validate the latter. *Precourt* v. *Driscoll*, 85 N. H. 280, 157 Atl. 525, 78 A. L. R. 874. Thus it has been held that the federal courts must follow the law of the state as to the burden of proof in certain classes of cases. *Cities Service Co.* v. *Dunlap*, 308 U. S. 208, 60 S. Ct. 201, 84 L. Ed. 196; *Palmer* v. *Hoffman*, 318 U. S. 109, 117, 63 S. Ct. 477, 87 L. Ed. 645, 144 A. L. R. 719; and as to conflict of laws *Griffin* v. *McCoach*, 313 U. S. 498, 61 S. Ct. 1023, 85 L. Ed. 1481, 134 A. L. R. 1462; *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477; and as to state statutes of limitation in equity cases, *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079, 160 A. L. R. 1231."

In *Sullivan* v. *Title Guarantee & Trust Co.*, (C. C. A. 2), 167 F. 2d 393, 395; *Guaranty Trust Company* v. *New York* v. *York* was cited and declared authority for the statement that:

"As we have been often advised, a federal court in a diversity suit 'should adjudicate controversies as if it were only another state court.'"

In *Ladd* v. *Brickley*, (C. C. A. 5) 158 F. 2d 212, 219, we find:

"The lawsuits begun by the Trustee were started in 1943. It is obvious that the action will be barred unless it can be brought under the concealment exception to the running of the statute. It is also clear

now that the plaintiff will have no advantage on this aspect of his case in the federal court over what he has in the state court. Since these suits were begun the Supreme Court has decided the important case of *Guaranty Trust Co. of New York* v. *York*, 1945, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079, 160 A. L. R. 1231, which is conclusive authority for the statement just made."

Bergeron v. *Mansour*, (C. C. A. 1) 152 F. 2d 27, 28, reads as follows:

"State statutes of limitations, whether regarded as having 'procedural' or 'substantive' effect, are binding on the federal courts, sitting in equity or at law, where the rights pursued in the federal courts are granted by the state. *Guaranty Trust Co. of New York* v. *York*, 325 U. S. , 65 S. Ct. 1464."

Among the many cases in the District Courts, in which *Guaranty Trust Company of New York* v. *York* has been cited and followed, we are selecting as typical that of *Rose* v. *United States*, (D. C. E. D. New York) 73 Fed. Supp. 759, 763, in which Judge Kennedy said:

"I suggest that the decision in *Guaranty Trust Company* v. *York*, *supra*, expresses a federal policy (326 U. S., at page 112, 65 S. Ct., at page 1471, 89 L. Ed. 2079, 160 A. L. R. 1231): 'The operation of a double system of conflicting laws in the same State is plainly hostile to the reign of law.' ".

This case, it should be remembered, arose because Julius Ranny Ragan, the petitioner, a citizen of the State of Missouri (R. 1), at a time when he was driving an automobile through the State of Kansas collided with the truck of the defendant, Merchants Transfer & Warehouse Company, Inc., a citizen of the State of Kansas, upon U. S. Highway No. 69, near Louisburg, in the State of Kansas (R. 2). Solely and only upon the ground of diversity of

citizenship Julius Ranny Ragan chose the United States District Court for the District of Kansas, Third Division as the forum for his lawsuit.

We are unable to understand precisely the argument made at pages 28 to 32 inclusive, of the petition for writ of certiorari. We believe, however, that the petitioner is seeking to escape from the unqualified admissions made in the District Court, which has become the law of the case:

> "I concede—freely concede, that if this case was pending in the State Court, if it had been commenced in the State Court and pending in the State Court then the cause of action would have been barred * * *" (R. 48).

Any court desires to render its opinion upon the law as it exists rather than upon the law of the case; hence, we shall endeavor to review the decisions of the Kansas Supreme Court concerning the question involved so that no doubt may remain concerning the position of Section 60-308, G. S. Kan., 1935, as an integral part of the statute of limitations.

In *Dunlap* v. *McFarland,* 25 Kan. 488, the opinion was written by Judge Valentine. At that time the Supreme Court of Kansas was composed of Hon. Albert H. Horton, Chief Justice, Hon. D. M. Valentine and Hon. D. J. Brewer (afterwards one of the Justices of the Supreme Court of the United States).

There, a suit upon a promissory note was commenced on April 16, 1878, by filing a petition, a praecipe and an affidavit for an attachment, and a summons and order of attachment were issued on the same day. The defendant moved to set aside the order of attachment because the

defendant was a non-resident of the State and the summons was not and could not have been served upon him. The first publication of summons as against the non-resident defendant was made on April 19, 1878. At that time Section 20 of the Civil Code was identical in language with Section 60-308, G. S. Kan., 1935, as quoted in the opinion of the Circuit Court of Appeals by Judge Huxman at the top of page 49 of the record.

Section 190 of the then Civil Code (except for the addition of sub-paragraph "Seventh," which is immaterial in our matter) is identical with Section 60-306, G. S. Kan., 1935, which provides for the general periods of limitation, including a limitation of two years upon an action for tort.

Judge Valentine in *Dunlap* v. *McFarland*, said:

> "But it is further claimed by the defendant that the attachment was erroneously issued before any action was commenced, and he refers to Sections 190 and 20 of the Civil Code, in connection with the foregoing facts, to support his claim. Of course an attachment cannot rightfully be issued before the action (of which it is only an incident) is commenced. But we do not think that the attachment in this case was issued before the action was commenced. The action was commenced when the petition and praecipe were filed and when the summons was issued. *Section 20 of the Civil Code has application only to the statute of limitations*; but even that section provides that 'an attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this article, when the party faithfully, properly, and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons within sixty days.' We do not think that this claim of the defendant is tenable" (Italics ours).

Hence we have at this early day a declaration that Section 20 of the then Civil Code, now Sec. 60-308, G. S. Kan., 1935, has application only as a part of the statute of limitations.

In the case of *Bannister* v. *Carroll*, 43 Kan. 64, 22 Pac. 1012, an action was commenced on July 15, 1887, by the filing of a petition, an affidavit for publication, praecipe for summons by publication and an affidavit for order of attachment. The attachment was issued and levied on real estate. Summons by publication was made. The first notice appeared in the newspaper issue of July 21, 1887. The court stated the question as follows:

> "The exact question therefore is: Is a case brought against a non-resident, wherein at the time the petition is filed, an affidavit for publication is also filed, is it necessary that an ordinary summons, such as is served personally on defendant, be issued?"

The court said:

> "It will be observed that there are different provisions of the code prescribing the time at which an action is to be deemed commenced. Section 81 provides that for the purpose of *lis pendens*, the action is pending the moment the petition is filed, if a summons be served or the first publication made within sixty days after the filing of the petition; the service of the summons or the first publication, relating back to the filing of the petition. Article 3 of the code treats of the time within which civil actions are to be commenced to avoid the bar of the statute of limitations; and Section 20 of that article provides, that within the meaning of this article, an action shall be deemed commenced at the date of the summons that is personally served or the date of the first publication, if a summons is served or a first publication made within sixty days. If the construction contended for be applied to this section of the code, it is impossible to

have an order of attachment against a non-resident defendant, for as to him the action shall deemed to be commenced at the date of the first publication, and yet that publication must notify him that his real estate has been attached in the action (Code of Civil Procedure, Section 74; *Cohen* v. *Trowbridge*, 6 Kan. 385). It is of the essence of things that an attachment which is an incident of a lawsuit, cannot be had until the suit is commenced. Under this provision, in regard to the time within which an action must be commenced in order to avoid *the bar of the statute of limitations*, the action is not deemed commenced against a non-resident defendant until the date of the first publication, providing that is made within sixty days from the filing of the petition. This first publication must notify the non-resident defendant that his real property has been attached. This construction involves an absurd impossibility, and demonstrates beyond doubt that Section 20, Article 3, has no application except to fix an arbitrary time at which the statutes of limitation cease to run against the claim or demand of the petition. Article 6 of the code treats of the commencement of a civil action, and prescribes what acts are necessary on the part of the plaintiff, and what duties are to be discharged by the ministerial officers of the court in order to institute an action. Sections 57 and 81 of this article are the only two sections of the code of civil procedure that have a direct bearing on this question, and we have given our construction of these in the first part of this opinion. Section 190 of the code provides that the plaintiff in a civil action for the recovery of money may, at or after the commencement thereof, have an attachment against the property of the defendant. If our construction of the other sections is correct, this means that the plaintiff, at the time he files his petition, can have an attachment. In *Dunlap* v. *McFarland*, an order of attachment was issued at the same time that the summons was issued, both writs issuing at the time the petition was filed. On the same day that the order of attachment was issued, it was levied on certain real estate belonging

to the defendant. On the next day both the order of attachment and the summons were returned. The return of the summons was that the defendant was not found. On the same day of the return of these writs, an affidavit for service by publication was filed, and the first publication was made on the third day after the petition was filed. On this state of facts, Mr. Justice Valentine, the other justices concurring, says (we quote from the syllabus of the case):

" 'That for the purpose of the attachment the action is to be deemed to have been commenced at the time of the filing of the petition, the praecipe and the affidavit for the order of attachment, and that the order of attachment will not be held to be invalid because issued before any action was commenced.'

"It is also expressly said in the body of the opinion 'that Section 20 of the civil code *has application only to the statute of limitations,*' but even that section provides that—

" 'An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this article, when the party faithfully, properly and diligently endeavors to procure a service, but such attempt must be followed by the first publication or service of the summons within sixty days' " (Italics ours).

In *Wester* v. *Long*, 63 Kan. 876, 66 Pac. 1032, certain corn was attached for unpaid rent. Agnew, the debtor, left the country before summons was served, and he was not served in any way. Wester claimed the attached property by purchase and brought replevin against the sheriff, who was holding under the writ of attachment. The contention was made by Wester that since no personal service or service by publication was attempted for more than sixty days after the filing of the petition in the attachment case, the sheriff could not justify his possession of the property.

The court said:

> "Section 20 of the civil code (Gen. Stat., 1901, Sec. 4448), relating to attempts to commence actions, has application only to the statute of limitations (*Dunlap* v. *McFarland, Adm'r*, 25 Kan. 488)."

Again, we learn that Sec. 60-308, G. S. Kan., 1935, appearing at the top of page 49 of the record has reference only to the statute of limitations of the State of Kansas.

In *Green* v. *McCracken*, 64 Kan. 330, 67 Pac. 857, the first paragraph of the syllabus by the court reads as follows:

> "An action will not be dismissed on motion of a defendant simply because no service of summons of any kind has been made on him within sixty days from the filing of the petition."

Green sued Olson; attached certain stock of groceries belonging to Olson, and disposed of them under the attachment. McCracken, who held a chattel mortgage on the stock of groceries, sued Green and the constable on July 14, 1898. The summons was returned *non est* as to Green. September 17th McCracken filed affidavit for attachment; returned October 15th unexecuted. November 26th plaintiff filed an affidavit for garnishment, some of whom disclosed indebtedness to Green. Green then filed his motion to dismiss because more than sixty days had elapsed since the filing of the petition and no service of summons having been made upon him during the sixty days period. Green, in other words, relied upon Section 60-308 as applicable to any and all pending cases.

The court said:

> "First. The first is that growing out of the overruling of Green's motion to dismiss, the claim being made that, inasmuch as no service was obtained upon

him before the expiration of sixty days after the filing of the petition, the court was without jurisdiction to proceed further in the case.

"Section 57 of the code of civil procedure (Gen. Stat., 1901, Sec. 4487) provides:

"'A civil action may be commenced in a court of record by filing in the office of the clerk of the proper court a petition and causing a summons to be issued thereon.'

"This case then was properly commenced on the day of the filing of the petition. Successive but unsuccessful attempts were made thereafter to get jurisdiction of the property of the defendant. These attempts were continued until finally they were successful through garnishment proceedings, and thereafter prompt steps were taken to procure service by publication. Neither the section quoted nor any other one requires the petition to be refiled after the expiration of sixty days in cases where service has not been had during that interval. To be sure, the mere filing of the petition without being followed by the service of summons in the time specified would not stay the statute of limitations as provided in section 20 of the code (Gen. Stat., 1901, Sec. 4448). Neither would it amount to a *lis pendens* under section 81 (Gen. Stat., 1901, Sec. 4515). But neither of these questions arises here. The motion of the defendant was to dismiss the action. Plaintiff in error thinks that the case of *Jones* v. *Warnick*, 49 Kan. 63, 30 Pac. 115, is decisive of the question in his favor. We are unable to see the relevancy of this case to the question in hand. We see no error in the action of the trial court in overruling this motion."

This case of *Green* v. *McCracken* plainly discloses that the sixty days period as provided by Section 60-308 is only considered in connection with the statute of limitations. Until the bar of the statute of limitations arises, the case is pending and service may be had at any time without refiling the petition.

In *State* v. *Alexander*, 84 Kan. 393, 114 Pac. 241, we have a case which is squarely in point with the opinion of the Circuit Court of Appeals of the Tenth Circuit in the instant case. The obligation of Thomas was evidenced by a bond and conviction of December 30, 1905. Suit was actually begun on February 18, 1909. The defendant Thomas prevailed in the District Court upon a demurrer which presented the statute of limitations of the State of Kansas. The State of Kansas appealed. The lower court was affirmed. The court phrased the question upon appeal as follows:

> "It is insisted by the appellee that the cause of action on February 18, 1909, when the first publication was had, was barred by the statute of limitations, and that the amended petition failed to state facts sufficient to constitute a cause of action. His contention as to the first proposition is that the cause of action accrued on December 30, 1905, when Thomas was convicted, and that no action was really begun until February 18, 1909, which was more than three years from the date of conviction. Section 19 of the civil code provides that an action shall be deemed commenced as to each defendant at the date of the summons which is served on him, and, when service by publication is proper, at the date of the first publication; and that an attempt to commence an action shall be deemed equivalent to the commencement thereof, if followed by publication or service within sixty days. But such service or publication must be had before the limitation has run, in order to keep the cause of action alive (*Dunlap* v. *McFarland, Adm'r*, 25 Kan. 488; *Insurance Co.* v. *Stoffels*, 48 Kan. 205; *Wester* v. *Long*, 63 Kan. 876; *Green* v. *McCracken*, 64 Kan. 330)."

The court in effect adhered to its previous decisions that the service of summons or first publication must be

had within the sixty day period to avoid the bar of the statute of limitations.

Section 19 of the Civil Code, as mentioned in *State* v. *Alexander* is identical with Sec. 60-308, G. S. Kan., 1935.

In *Brock* v. *Francis*, 89 Kan. 463, 131 Pac. 1179, the tort out of which the action arose occurred on May 11, 1904. The applicable statute in Kansas was two years. Petition was filed May 9, 1906, two days before the bar of the statute. Summons was issued and served May 11th, answer day being June 8th. On June 7th defendant filed motion to set aside service, which on July 7th was confessed. July 7th praecipe for alias summons was filed, another on August 29th, and another on October 1st. Alias summons issued October 1st was served October 10th. October 29th, motion to set aside service was filed, which was overruled May 4, 1907. The defendant answered and pleaded the statute of limitations.

The court in its opinion cited the previous cases relating to the statute of limitations, and said:

> "No exception to the quashing of the original was taken, and of course none could have been taken, for the motion was confessed. The defendant cites Section 19 of the Civil Code, especially the clause:
>
> "'An attempt to commence an action shall be deemed equivalent to the commencement thereof within the meaning of this article when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons within sixty days.'
>
> "This section was said at an early day to have application only to the statute of limitations (*Dunlap* v. *McFarland*, 25 Kan. 488, 491)."

The Supreme Court upheld the plea of the statute of limitations as interposed by the defendant and remanded the case "with directions to render judgment for the defendant."

This case of *Brock* v: *Francis*, involving a tort action, the filing of the petition shortly before the end of the two year period of limitations, the quashing of the first summons and the service of the alias summons after the sixty day period had expired places this case on all fours with the instant case.

It, therefore, appears that the petitioner, who was frank in his recognition of the Kansas law in the District Court (R. 48), is somewhat less candid in the incorrect statement appearing at the top of page 32 of the petition.

The case of *Bomar* v. *Keyes*, (C. C. A. 2) 162 F. 2d 136, which appears to be the main reliance of the petitioner is not in conflict with the decision of the Circuit Court of Appeals of the Tenth Circuit in the instant case.

This case of the Second Circuit was handed down a year and eleven months after *Guaranty Trust Company of New York* v. *York*. No mention is made in *Bomar* v. *Keyes* of the York case. The New York statute relative to the sixty day period of service was not involved in *Bomar* v. *Keyes*. The complaint was filed on October 31, 1945, and defendants were served with summons and complaint in December of 1945.

If similar facts existed in the instant case, the service would have been good and would have been within the sixty day statutory period provided. We have no criticism whatsoever of the case of *Bomar* v. *Keyes*.

CONCLUSION.

The Kansas Supreme Court from its very beginning until the present time has upheld Sec. 60-308, G. S. Kan., 1935, as an integral part of the statutes of limitations. The Kansas court has ruled that Section 60-308 is solely and only a statute of limitations. The ordinary commencement of an action was already provided by Section 60-301. Except as a statute of limitations Section 60-308 is surplusage.

If the nub of the policy so aptly defined in *Guaranty Trust Company of New York* v. *York* is to be maintained, the petition for writ of certiorari should be denied.

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